

Sex Offender Identification and Profiling Systems

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11.1 Chapter Overview

This chapter discusses various procedures and systems that are used inside and outside of Michigan to collect, store, and disseminate personal information concerning sex offenders. These procedures and systems were created to facilitate the investigation and apprehension of sex offenders, and to assist trial courts in making fully informed bail, pre-trial release, and

sentencing decisions. The procedures and systems discussed in this chapter are as follows:

- F The Sex Offenders Registration Act (SORA). MCL 28.721 et seq. See Section 11.2.
- F Combined DNA Index System (CODIS). 42 USC 14132. See Section 11.3.
- F DNA Identification and Profiling System. MCL 28.171 et seq. See Section 11.4.
- F “Sexually Motivated Crimes” Confidential Filing System. MCL 28.247. See Section 11.5.
- F Law Enforcement’s Retention of Arrest Card, Photograph, and Description. MCL 28.243. See Section 11.6.

For discussion on setting aside or expunging convictions, including offenses that may not be set aside or expunged, see Section 9.8.

11.2 Sex Offenders Registration Act

Note: As of this Benchbook’s research cut-off date (July 31, 2002), Enrolled Senate Bill 1275 has not yet been signed by the Governor. However, if SB 1275 becomes law, it will amend the SORA, effective October 1, 2002, to require “registered” individuals who are full- or part-time employees, contractual providers, volunteers, or students of an institution of higher education to *report* their status in person to the local law enforcement agency, sheriff’s department, or State Police post near that campus of higher education. Please also note that SB 1275 will amend other provisions of SORA, including maximum penalties for some registration and verification violations, as well as the definition of “misdemeanor” and “felony” listed offense. Although SB 1275 did not become law in time to be incorporated into this Benchbook, the Benchbook, along with other MJI benchbooks and monographs, will be updated monthly, starting October 2002. The updates, which can be downloaded, printed, and inserted into existing benchbooks and monographs, will be available at <http://courts.michigan.gov> (last visited July 25, 2002).

The “Sex Offenders Registration Act” (“SORA”), MCL 28.721 et seq., is Michigan’s version of Megan’s Law. Under SORA, an individual* “convicted” of a “listed offense,” or an individual required to be registered (or otherwise identified) as a sex or child offender in another state or country, must register as a sex offender if certain residency requirements are met. See Section 11.2(A) for those requirements. Once registered, the SORA mandates community notification of adult (and selected juvenile) registrations.

Note: “Megan’s Law” takes its name from New Jersey’s “Sexual Offender Registration Act,” codified at NJSA 2C:7-1 et seq., and from Megan Kanka, a seven-year-old girl abducted, raped, and murdered on July 29, 1994 near her New Jersey home by a twice-convicted sex offender, Jesse Timmendequas, who lived across the street from Megan. See *Doe v Poritz*, 283 NJ Super 372, 377; 661 A2d 1335, 1338 (1995) (*Doe I*), aff’d as modified 142 NJ 1; 662 A2d 367 (1995) (*Doe II*), *State*

*The term “individual” is used throughout this section and includes both adult and juvenile offenders. See MCL 28.722(a). Juvenile offenders are discussed separately in Section 11.2(H).

v Timmendequas, 161 NJ 515; 737 A2d 55 (1999), and *Lanni v Engler*, 994 F Supp 849, 851 (ED Mich, 1998).

Michigan's Act was enacted in response to Megan Kanka's murder and to federal legislation. On September 13, 1994, as part of the Violence Crime Control and Law Enforcement Act of 1994, Congress enacted the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act,* which "conditioned the availability of federal crime prevention funds upon a state's creation of a sex offender registration and community notification program." *Lanni, supra* at 851. All 50 states, the District of Columbia, and Puerto Rico now have their own version of Megan's Law. Walsh & Cohen, *Sex Offender Registration and Community Notification: A "Megan's Law" Sourcebook* (2001), p 1-1, 5-142, 5-636.

*42 USC 14071
et seq.

Note: Jacob Wetterling was abducted at age 11 by an armed, masked man on October 22, 1989, near St. Joseph, Minnesota, while riding his bicycle home from a convenience store with his brother and a friend. Neither Jacob nor his abductor have ever been located. See *United States v Green*, 983 F2d 100, 101 (CA 8, 1992); and Johnson, *After Nine Years, Family Still Searching for Missing Peace*, Orange County Reg. (Cal., December 31, 1998), p 4, available at 1998 WL 21287576. Ironically, even though Jacob Wetterling's disappearance revealed no evidence of sexual assault, it spawned the Jacob Wetterling Act, which later gave impetus to the enactment of sex offender registration programs across all 50 states, Puerto Rico, and the District of Columbia.

On May 17, 1996, Congress amended the Jacob Wetterling Act to include a mandatory community notification provision—an amendment known as the federal version of Megan's Law. *Lanni, supra* at 851. Thus, as amended, the Jacob Wetterling Act places four obligations on the states: (1) to register the current addresses of sexual offenders and sexually violent predators; (2) to maintain accurate registries; (3) to maintain and distribute registry information to law enforcement; and (4) to disclose information to the public when necessary to provide for public safety. See Comparet-Cassani, *A Primer On The Civil Trial Of A Sexually Violent Predator*, 37 San Diego L. Rev 1057, 1062 (2000).

In response to Congress's 1996 amendment, the Michigan Legislature amended the SORA, effective April 1, 1997, to include a public notification requirement. Thus, the SORA now contains both registration and community notification requirements. Some sex offender experts and state legislatures believe that the registration and community notification requirements are needed to reduce sex offender recidivism. However, whether sex offender registration (and community notification) programs reduce sex offender recidivism is still controversial and not well settled, although the programs do assist law enforcement agencies with conducting investigations and locating and apprehending sex offenders. See Walsh & Cohen, *supra* at p 1-3.

A. Who Must Register?

*For registered individuals who move outside Michigan, see Section 11.2(C)(2).

*If passed and signed into law, House Bill 5163 would make it discretionary on trial courts to require individuals to register under SORA.

An individual who is domiciled, residing, working, or attending school for 14 or more consecutive days (or 30 or more total days in a calendar year) in Michigan is required to register under the SORA if any of the following apply:*

(1) The individual is convicted of a “listed offense” after October 1, 1995. MCL 28.723(1)(a).

(2) The individual is convicted on or after September 1, 1999 of an offense added on September 1, 1999 to the definition of “listed offense.” MCL 28.723(2)(a).

(3) The individual is required to be registered as a sex offender in another state or country regardless of when the conviction was entered. MCL 28.724(6)(c).

(4) The individual is required to register or otherwise be identified as a sex or child offender or predator under a comparable statute of that state. MCL 28.723(1)(d).*

Note: For convictions on or before October 1, 1995, see MCL 28.723(1)(b)-(c). For convictions before September 1, 1999 of offenses added on September 1, 1999 to the definition of “listed offense,” see MCL 28.723(2)(b)-(d); see also the note in Section 11.2(A)(2), below.

1. “Convicted”

Being “convicted” means any of the following under MCL 28.722(a)(i)-(iv):

- F Having a judgment of conviction or a probation order entered in any court having jurisdiction over criminal offenses, including but not limited to, a tribal or military court, and including a conviction subsequently set aside pursuant to MCL 780.621-780.624. See also MCL 780.622(3) (inability to set aside convictions for listed offenses).
- F Being assigned to youthful trainee status pursuant to MCL 762.12-762.15. See *People v Rahilly*, 247 Mich App 108, 116-117 (2001) (HYTA defendants must register in accordance with the SORA, even following discharge from youthful trainee status).
- F Having an order of disposition entered pursuant to MCL 712A.18 that is open to the general public under MCL 712A.28 (records of cases).
- F Having an order of disposition or other adjudication in a juvenile matter in another state or country.

Note: Whether juvenile delinquents are required to comply with the SORA’s registration requirements *after* an order of disposition has been successfully set aside is unclear. The foregoing definition of “convicted” does not contain language requiring compliance with SORA in such circumstances, nor does the Probate Code’s set-aside provisions under MCL 712A.18e. However, the Code of Criminal Procedure’s set-aside provisions

do contain such a provision: “If the conviction set aside . . . is for a listed offense . . . the applicant is considered to have been convicted of that offense for purposes of [the SORA].” MCL 780.622(3). However, the Code of Criminal Procedure does not generally apply to juvenile offenders. For information on the applicability of the Code of Criminal Procedure to juvenile offenders and proceedings, see *In re McDaniel*, 186 Mich App 696, 698 (1991): “[T]he many provisions of the Code of Criminal Procedure which are duplicative of or in conflict with the juvenile court rules and the Probate Code do not apply in juvenile proceedings.”

2. “Listed Offense”

A “listed offense” means any of the following under MCL 28.722(d):

Note: Some of the following “listed offenses” are asterisked (*). An asterisk (*) signifies that the offense was added to the definition of “listed offense” by the Legislature through 1999 PA 85, effective September 1, 1999. Under MCL 28.723(2)(a)-(d), an individual convicted of a 1999 “listed offense” must register for that offense if one of the following applies:

- (a) The individual is convicted of that offense on or after September 1, 1999.
 - (b) On or after September 1, 1999, the individual is on (or placed on) probation or parole, committed to jail, committed to the jurisdiction of the Department of Corrections, under the jurisdiction of Family Division of Circuit Court, or committed to the Family Independence Agency for that offense.
 - (c) On September 1, 1999 the individual is on probation or parole for that offense which has been transferred to Michigan, or the individual’s probation or parole for that offense is transferred to Michigan after September 1, 1999.
 - (d) On September 1, 1999, in another state or country, the individual is on probation or parole, committed to jail, committed to the jurisdiction of the Department of Corrections or a similar type of state agency, under the jurisdiction of a court that handles matters similar to those handled by Michigan’s Family Division of Circuit Court, or committed to an agency with the same authority as Michigan’s Family Independence Agency for that offense.
- F Accosting, enticing or soliciting a child for immoral purposes, MCL 750.145a.
 - F Accosting, enticing or soliciting a child for immoral purposes, second offense, MCL 750.145b.
 - F Child sexually abusive activity, MCL 750.145c.
 - F Crimes against nature or sodomy, MCL 750.158, but only if a victim is less than 18 years of age.*
 - F A third or subsequent violation of any combination of the following:

- Disorderly person (indecent or obscene conduct), MCL 750.167(1)(f).
 - Indecent exposure, MCL 750.335a.
 - Local ordinances substantially corresponding to MCL 750.167(1)(f) (disorderly persons) or MCL 750.335a (indecent exposure).
- F Except for juvenile dispositions or adjudications, gross indecency between males, MCL 750.338, but only if a victim is less than 18 years of age.*
- F Except for juvenile dispositions or adjudications, gross indecency between females, MCL 750.338a, but only if a victim is less than 18 years of age.*
- F Except for juvenile dispositions or adjudications, gross indecency between males and females, MCL 750.338b, but only if a victim is less than 18 years of age.*
- F Kidnapping, MCL 750.349, but only if a victim is less than 18 years of age.*
- F Kidnapping Child Under 14, MCL 750.350.*
- F Soliciting and Accosting, MCL 750.448, but only if a victim is less than 18 years of age.*
- F Pandering, MCL 750.455.
- F First-degree criminal sexual conduct, MCL 750.520b.
- F Second-degree criminal sexual conduct, MCL 750.520c.
- F Third-degree criminal sexual conduct, MCL 750.520d.
- F Fourth-degree criminal sexual conduct, MCL 750.520e.
- F Assault with intent to commit criminal sexual conduct, MCL 750.520g.
- F A violation of a law of this state or a local ordinance of a municipality that by its nature constitutes a sexual offense against a person less than 18 years of age.*

Note: The elements of this “catch-all” provision are: (1) the defendant must have been convicted of a state law violation or a municipal ordinance violation; (2) the state law or municipal ordinance violation must, “by its nature,” constitute a “sexual offense”; and (3) the victim of the state law or municipal ordinance violation must be under 18. See *People v Meyers*, 250 Mich App 637, 655 (2002) (defendant’s conviction under MCL 750.145d(1)(b) for using the Internet to communicate with a person for the purpose of attempting to commit conduct proscribed under MCL 750.145a, satisfied the foregoing “catch-all” elements and required him to register under SORA, even though his exact conviction was not a “listed offense”).

- F An offense committed by a person who was, at the time of the offense, a sexually delinquent person, as defined in MCL 750.10a.*
- F An attempt or conspiracy to commit any of the foregoing offenses.

Note: In *Meyers, supra*, the Court of Appeals held that the defendant was required to register under the foregoing provision even though his exact conviction under MCL 750.145d(1)(b) was not a “listed offense,” because he used the Internet to communicate with a person for the purpose of *attempting* to commit conduct proscribed by MCL 750.145a (accosting, enticing, or soliciting a child), which is a “listed offense” under SORA.

- F An offense substantially similar to any of the foregoing offenses under a law of the United States, any state, any country, or under tribal or military law.*

*Offenses under tribal and military law were added by 1999 PA 85, effective September 1, 1999.

3. “Municipality”

“Municipality” means “a city, village, or township of this state.” MCL 28.722(e).

4. “Residence”

“Residence” means “that place at which a person habitually sleeps, keeps his or her personal effects, and has a regular place of lodging. If a person has more than 1 residence, or if a wife has a residence separate from that of the husband, that place at which the person resides the greater part of the time shall be his or her official residence for the purposes of this act. This section shall not be construed to affect existing judicial interpretation of the term residence.” MCL 28.722(f).

5. “Student”

“Student” means “an individual enrolled on a full- or part-time basis in a public or private educational institution, including but not limited to a secondary school, trade school, professional institution, or institution of higher education.” MCL 28.722(g).

B. Initial Registration and Duties

1. Individuals Convicted in Michigan

Under MCL 28.724(5), an individual convicted of a “listed offense” in Michigan after October 1, 1995, who is domiciled, residing, working, or attending school for 14 or more consecutive days (or 30 or more total days in a calendar year) in Michigan must register *before* any of the following occurs:

- F Sentencing.

*See Section 11.2(A)(1) for more information on the Holmes Youthful Trainee Act (HYTA) and its relationship to the SORA.

F Entry of the order of disposition.

F Assignment to youthful trainee status.*

Note: For registration procedures regarding an individual convicted of a listed offense on or before October 1, 1995, see MCL 28.724(2)-(3). For registration procedures regarding an individual convicted on or before September 1, 1999 of offenses that were added on September 1, 1999 to the definition of listed offense, see MCL 28.724(4).

The probation officer or the court must provide the registration form, explain the duty to register, verify the individual's address, provide notice of address changes, and accept the completed form for processing under MCL 28.726. MCL 28.724(5). Furthermore, the court shall *not* impose sentence, enter the order of disposition, or assign the individual to youthful trainee status until it determines that the individual's registration was forwarded to the State Police. *Id.* The officer, court, or agency registering an individual must forward the registration or notification to the State Police by the law enforcement information network (LEIN) within three business days after registration or notification. MCL 28.726(2).

Note: If an individual is required to be registered under the SORA and is placed on probation, the probation order must include a condition that the individual comply with the SORA. MCL 771.3(1)(g).

2. Individuals Convicted or Registered Out-Of State

MCL 28.724(6)(a)-(c) require the following individuals to register with the local law enforcement agency, sheriff's department, or State Police **within 14 days** after becoming domiciled, temporarily residing, working, or being a student in Michigan for 14 or more consecutive days (or 30 or more total days in a calendar year):

(a) An individual convicted in another state or country after October 1, 1995, of a listed offense as defined before September 1, 1999;

(b) An individual convicted in another state or country of an offense added on September 1, 1999, to the definition of listed offenses; or

(c) An individual required to be registered as a sex offender in another state or country regardless of when the conviction was entered.

C. Post-Registration Change of Status

1. In-State Changes

MCL 28.725(1) requires an individual who is required to be registered under the SORA to notify local law enforcement, the sheriff's department having

jurisdiction where the individual's new residence or domicile is located, or the State Police **within 10 days** after any of the following occur:

- F The individual changes his or her residence, domicile, or place of work or education.
- F The individual is paroled.
- F Final release of the individual from department of corrections jurisdiction.

MCL 28.725(2) requires the Department of Corrections to notify local law enforcement, the sheriff's department having jurisdiction over the area to which the individual is transferred, or the State Police **within 10 days** after any of the following occur:

- F The individual is transferred to a community residential program.
- F The individual is transferred into a minimum custody correctional facility of any kind, including a correctional camp or work camp.

For registration duties and procedures for an individual convicted of a listed offense on or before October 1, 1995, see MCL 28.724(2)-(3).

For registration duties and procedures for an individual convicted on or before September 1, 1999, of an offense that was added on September 1, 1999, see MCL 28.724(4)(a)-(g).

2. Out-of-State Changes

An individual required to be registered under the SORA who changes domicile or residence to another state must notify the State Police *by form* prescribed by the State Police **not later than 10 days** before changing domicile or residence to that other state. The individual must indicate the new state and, if known, the new address. The State Police must update the registration and compilation databases and promptly notify the appropriate law enforcement agency and any applicable sex or child offender registration authority in the new state. MCL 28.725(3).

If an individual required to be registered under SORA is transferred from a state correctional facility to any correctional facility or probation or parole in another state, or if the individual's probation or parole is transferred to another state, the Department of Corrections must **promptly notify** the State Police and the appropriate law enforcement agency and any applicable sex or child offender registration authority in the new state. MCL 28.725(4). The State Police must update the registration and compilation databases. *Id.*

D. The “Registration”

1. Form and Contents

A “registration” under SORA must be made on a form provided by the State Police. MCL 28.727(1). The registration must contain the following information under MCL 28.727(1)(a)-(e):

- F Name.
- F Social security number.
- F Date of birth.
- F Address.
- F A brief summary of the individual’s convictions for listed offenses, regardless of the date of conviction, including where the offense occurred and the original charge.
- F A complete physical description.
- F A photograph.
- F Fingerprints, if not already on file with the State Police.

Note: A sex offender in a witness protection and relocation program is only required to provide the name and identifying information of his or her new identity for purposes of SORA’s registration requirements. MCL 28.727(1)(a).

The form used for registration or verification* must contain a written statement explaining the individual’s duty to provide notice of a change of address, as required under MCL 28.725 and MCL 28.725a. MCL 28.727(3).

The registration may contain the following additional information: (1) blood type; and (2) whether a DNA identification profile is available for the individual. MCL 28.727(2).

2. An Individual’s Duties

An individual must sign the registration, notice, and verification.* MCL 28.727(4). However, regardless of whether the individual signs them, the registration, notice, and verification must be forwarded to the State Police. Additionally, the individual must not knowingly provide false or misleading information concerning a registration, notice, or verification. MCL 28.727(6). The registration, notice, and verification must be forwarded to the State Police, regardless of whether the individual signs the registration, notice, or verification. MCL 28.727(4).

*See Sections 11.2(D)(2) and 11.2(F) for more information on an individual’s verification duties.

*See Section 11.2(F) for more information regarding the verification process.

3. Agency Duties

The officer, court, or an employee of the agency registering the individual or receiving or accepting a registration must sign the registration form. MCL 28.727(5).

For individuals assigned to youthful trainee status under the Holmes Youthful Trainee Act (HYTA), the Department of Corrections, the sheriff, or the individual's probation officer must register the individual or accept the registration as provided under SORA. MCL 762.13(6).

E. Length of Registration Period

The SORA delineates two time periods during which an individual must comply with SORA's registration requirements:

F Lifetime.

F 25 years.

1. Lifetime Registration

Under MCL 28.725(7), individuals must comply with SORA's registration requirements for life if convicted of any of the following offenses or a substantially similar offense under a law of the United States, any state or country or a tribal or military court:

- F First-degree criminal sexual conduct, MCL 750.520b.
- F Second-degree criminal sexual conduct (victim under 13 years of age), MCL 750.520c(1)(a).
- F Kidnapping, but only if the victim is less than 18 years of age, MCL 750.349.
- F Kidnapping child under 14 years of age, MCL 750.350.
- F Child sexually abusive activity, MCL 750.145c(2)-(3).
- F Attempt or conspiracy to commit any of the immediately foregoing offenses.
- F A second or subsequent "listed offense"* after October 1, 1995 regardless of when any earlier listed offense was committed.

Note: A sex offender does not have to register for life if the first or second listed offense is for a conviction on or before September 1, 1999 for an offense that was added on September 1, 1999 to the definition of listed offense, unless convicted of a subsequent listed offense after September 1, 1999. MCL 28.725(7)(g).

*See Section 11.2(A)(2) for a definition of "listed offense."

2. 25-Year Registration or 10-Years After Release From Prison

Under MCL 28.725(6), individuals must comply with SORA's registration requirements for 25 years after the date of the initial registration if convicted of any listed offense other than an offense detailed in the foregoing subsection. However, if incarcerated in a state correctional facility, the individual must comply with the SORA's registration requirements for 10 years after the release from the facility, or 25 years from the date of initial registration, whichever is longer. *Id.*

F. Yearly or Quarterly Verification of Domicile or Residence

*See Section 11.2(D) for initial registration requirements.

Under MCL 28.725a(4), after initial registration,* individuals must verify their domicile or residence either yearly or quarterly by reporting **in person** to any of the following law enforcement agencies:

- F A local law enforcement agency.
- F The sheriff's department having jurisdiction where the individual resides or is domiciled.
- F The State Police post in or nearest to the individual's county of residence or domicile.

An officer or authorized employee of the law enforcement agency, sheriff's department, or State Police post must verify the individual's residence or domicile, sign and date the verification form, give a copy of the signed form to the individual (showing the date of verification), forward verification information to the State Police by the law enforcement information network (LEIN), and revise the data bases to indicate verification in the compilation. MCL 28.725a(5).

An individual required to be registered under SORA must maintain a valid operator's or chauffeur's license issued under the Michigan Vehicle Code, MCL 257.1 to 257.923, or an official state personal identification card issued under MCL 28.291 to 28.300, with the individual's current address. MCL 28.725a(6). The license or card may be used as proof of domicile or residence under MCL 28.725a. MCL 28.725a(6). An individual may also be required to produce another document bearing the individual's name and address, including but not limited to voter registration or a utility or other bill, or other satisfactory proof of domicile or residence. *Id.*

1. Yearly Verification ("Misdemeanor Listed Offenses")

*This includes individuals who had initial verifications on or before January 15, 2000. MCL 28.725a(4).

An individual who is not incarcerated and who registered for one or more "misdemeanor listed offenses" after January 15, 2000,* must verify his or her domicile or residence yearly in person, no earlier than January 1 and no later than January 15, at the local law enforcement agency, sheriff's department, or State Police post. MCL 28.725a(4)(a).

If an individual fails to report as required under MCL 28.725a(4)(a), the State Police must notify the local law enforcement agency, and an appearance ticket may be issued, as provided in MCL 764.9a to 764.9g. MCL 28.725a(8).

Under MCL 28.725a(4)(a), “misdemeanor listed offenses” are the following:

- F Accosting, enticing or soliciting a child for immoral purposes, MCL 750.145a.
- F Possession of child sexually abusive material, MCL 750.145c(4).
- F Disorderly person (indecent or obscene conduct), MCL 750.167(1)(f).
- F Soliciting and Accosting, MCL 750.448.
- F Indecent exposure (other than violation committed by person who was, at the time, a sexually delinquent person, as defined in MCL 750.10a), MCL 750.335a.
- F A violation of a local ordinance of a municipality substantially corresponding to any of the immediately foregoing crimes.
- F A violation of a law of this state or local ordinance of a municipality that by its nature constitutes a sexual offense against an individual less than 18 years old if the violation is not specifically designated a felony and is punishable by imprisonment for one year or less.
- F Attempt or conspiracy to commit any of the immediately foregoing offenses.
- F An offense substantially similar to any of the immediately foregoing offenses under a law of the United States, any state, or any country, or under tribal or military law.

2. Quarterly Verification (“Felony Listed Offenses”)

An individual who is not incarcerated and who is registered for one or more “felony listed offenses” after January 15, 2000,* must verify his or her domicile or residence quarterly in person, no earlier than the first day and no later than the fifteenth day of each April, July, October, and January, at the local law enforcement agency, sheriff’s department, or State Police post. MCL 28.725a(4)(b).

If an individual fails to report as required under MCL 28.725a(4)(b), the State Police must notify the local law enforcement agency, and an appearance ticket may be issued, as provided in MCL 764.9a to 764.9g. MCL 28.725a(8).

Under MCL 28.725a(4)(b), “felony listed offenses” are the following:

- F Accosting, enticing or soliciting a child for immoral purposes, second offense, MCL 750.145b.
- F Child sexually abusive activity, MCL 750.145c(2)-(3).
- F Kidnapping, MCL 750.349.

*This includes individuals who had initial verifications on or before January 15, 2000. MCL 28.725a(4).

- F Kidnapping Child Under 14, MCL 750.350.
- F Pandering, MCL 750.455.
- F First-degree criminal sexual conduct, MCL 750.520b.
- F Second-degree criminal sexual conduct, MCL 750.520c.
- F Third-degree criminal sexual conduct, MCL 750.520d.
- F Fourth-degree criminal sexual conduct, MCL 750.520e.
- F Assault with intent to commit criminal sexual conduct, MCL 750.520g.
- F Indecent exposure (if committed by a person who was, at the time of the offense, a sexually delinquent person as defined in MCL 750.10a), MCL 750.335a.
- F A violation of a law of this state that by its nature constitutes a sexual offense against an individual less than 18 years old if the violation is specifically designated a felony and is punishable by imprisonment for more than one year.
- F Attempt or conspiracy to commit any of the immediately foregoing offenses.
- F An offense substantially similar to any of the immediately foregoing offenses under a law of the United States, any state, any country, or under tribal or military law.

G. Public Notification and the Computerized Databases

The State Police must maintain two computerized databases of registrations and notices, one containing information for private use by law enforcement agencies, and one containing information for public use, indexed by zip code.* MCL 28.728(1)-(2). Under MCL 28.728(2), the computerized compilation intended for public notification must contain the following information for each individual:

- F Name and any aliases.
- F Address.
- F Physical description.
- F Birthdate.
- F Listed offense of which the individual is convicted.

1. Public Inspection At Law Enforcement Agencies During Regular Business Hours

A State Police post, local law enforcement agency, or sheriff's department must make the information from the computerized compilation, described in

*See Section 11.2(H) for more information on the public database's requirements and restrictions.

MCL 28.728(2), available for public inspection during regular business hours for the zip code areas located in whole or in part in its jurisdiction. MCL 28.730(2). These agencies may make this information available to the public through electronic, computerized, or other accessible means. MCL 28.730(3).

2. Public Inspection Via The Internet

Michigan's sex offender registrations are available at <http://www.mipsor.state.mi.us> (Michigan Public Sex Offender Registration) (last visited July 25, 2002), or through the Michigan State Police website at <http://www.msp.state.mi.us>* (last visited July 25, 2002). The on-line sex offender registrations can be searched by the sex offender's name, age, and 5-digit zip code. No information concerning victims is listed in the registrations or on the websites. The following sex offender information is listed on Michigan's Public Sex Offender Registration website: name; sex; race; date of birth; height; weight; hair color; eye color; address, including city, state, and zip code; citation for "listed offense"; and title of "listed offense."

*This website may also be accessed through many local law enforcement agency websites.

H. Juvenile Offenders Exempt From Public Notification Requirements

Although juvenile offenders not tried as adults are subject to the same *registration* requirements as adult offenders,* they are generally exempted from the SORA's *public notification* requirements and from having their registrations placed in the State Police's public database. See MCL 28.728(2) and *In re Ayres*, 239 Mich App 8, 12 (1999). However, this exemption does not apply to juvenile dispositions for either first-degree criminal sexual conduct, MCL 750.520b, or second-degree criminal sexual conduct, MCL 750.520c, *after the juvenile offender becomes 18 years of age*. Nor does this exemption apply to juvenile offenders convicted under "automatic" or "traditional" waivers, or by "case designation" methods. MCL 28.728(2) provides in pertinent part:

*See Section 11.2(D) for registration requirements.

"The department [of State Police] shall maintain a computerized data base separate from that described in subsection (1) to implement section 10(2) and (3) [MCL 28.730(2)-(3)]. The data base shall consist of a compilation of individuals registered under [SORA], but except as provided in this subsection, *shall not include any individual registered solely because he or she had 1 or more dispositions for a listed offense entered under . . . MCL 712A.18, in a case that was not designated as a case in which the individual was to be tried in the same manner as an adult under . . . MCL 712.2d. The exclusion for juvenile dispositions does not apply to a disposition for a violation of [MCL 750.520b (CSC I) or MCL 750.520c (CSC II)], after the individual becomes 18 years of age.*" [Emphasis added.]

Note: Proposed House Bill 5891 would make juvenile registration under SORA discretionary for CSC I and CSC II offenses. It would also provide criteria for courts. However, not all juvenile offenders can evade registration under this proposed bill. HB 5891 mandates registration for juveniles if they were previously convicted or found responsible for any CSC offense. HB 5891

also provides for retroactive application, allowing juveniles convicted or found responsible of CSC I or CSC II before the effective date of the proposed public act to petition the court for exemption from SORA.

I. Confidentiality of Registration and Criminal Penalties for Disclosure of Non-Public Information

Except as otherwise provided in SORA, a registration is confidential and shall not be open to inspection except for law enforcement purposes. MCL 28.730(1). Additionally, the registration, and included materials and information, are exempt from disclosure under section 13 of the Freedom of Information Act, MCL 15.243. *Id.*

An individual other than the registrant who divulges, uses, or publishes nonpublic information concerning the registration in violation of SORA is guilty of a misdemeanor punishable by imprisonment for not more than 90 days or a maximum \$500.00 fine, or both. MCL 28.730(4). Additionally, the registrant whose registration is revealed has a civil cause of action against the responsible party for treble damages. MCL 28.730(5).

J. National Reporting of Michigan Registrations

Under MCL 28.727(8), the State Police must *promptly* provide registration, notice, and verification information to the Federal Bureau of Investigation (FBI), and also to local law enforcement agencies and agencies of other states requiring the information, as provided by law. The information sent to the FBI is entered into a national database, known as the National Sex Offender Registry (NSOR), which was created through the Pam Lychner Sexual Offender Tracking and Identification Act of 1996, 42 USC 14072.

The Lychner Act requires the FBI to: (1) track the whereabouts and movement of each person convicted of a criminal offense against a minor victim or a sexually violent offense, or a person who is a sexually violent predator, 42 USC 14072(b)(1)-(3); and (2) register and verify the addresses of sex offenders who reside in states that do not have a “minimally sufficient sexual offender registration program.” 42 USC 14072(c). While the Pam Lychner Act *requires* NSOR to contain registrations for states not having “minimally sufficient” programs, it does not *preclude* participation from states with “minimally sufficient” programs. Despite having a “minimally sufficient” program, Michigan has legislation compelling the State Police to forward sex offender registrations to the FBI for inclusion in NSOR. MCL 28.727(8).

The registration information in the NSOR must include the individual’s current address, current photograph, and fingerprints. 42 USC 14072(c). This information must be released to federal, state, and local criminal justice agencies for law enforcement purposes; to federal state, and local governmental agencies responsible for conducting employment-related

background checks under 42 USC 5119a; and to the community in certain circumstances. 42 USC 14072(j).

Note: Registrations in NSOR may be accessed by contacting the Crimes Against Children Coordinator at your local FBI field office. General information about NSOR is available at <http://www.fbi.gov/hq/cid/cac/crimesmain.htm> (last visited July 25, 2002), which also has links to the individual state sexual offender registries.

K. Registration Violation Enforcement; Venue and Penalties

1. Venue for Prosecution

MCL 28.729(7)(a)-(c) establishes the following venues for prosecuting a failure to register, a failure to notify law enforcement within ten days of changing domicile out of state, and a failure to verify domicile or residence:

- F The individual's last registered address or residence.
- F The individual's actual address or residence.
- F Where the individual was arrested for the violation.

2. Penalties

Willful violations of the SORA are punished under MCL 28.729(1)-(6), as follows:

F No Prior Convictions

An individual having no prior convictions for a violation of SORA, other than a failure to comply with MCL 28.725a (yearly and quarterly verification), is guilty of a felony punishable by imprisonment for not more than four years or a maximum \$2,000.00 fine, or both. MCL 28.729(1)(a).

F One Prior Conviction

An individual having one prior conviction for a violation of SORA, other than a failure to comply with MCL 28.725a (yearly and quarterly verification), is guilty of a felony punishable by imprisonment for not more than seven years or a maximum \$5,000.00 fine, or both. MCL 28.729(1)(b).

F Two or More Prior Convictions

An individual having two or more prior convictions for a violation of SORA, other than a failure to comply with MCL 28.725a (yearly and quarterly verification), is guilty of a felony punishable by imprisonment for not more than ten years or a maximum \$10,000.00 fine, or both. MCL 28.729(1)(c).

F Failure to Comply with Yearly or Quarterly Verification

An individual who fails to comply with MCL 28.725a (yearly and quarterly verification), is guilty of a misdemeanor punishable by imprisonment for not more than 90 days or a maximum \$500.00 fine, or both. MCL 28.729(2).

F Failure to Comply with Registration Form Requirements

An individual who willfully fails to sign a registration, notice, or verification as provided in MCL 28.727(4) (registration form) is guilty of a misdemeanor punishable by imprisonment for not more than 93 days or a maximum \$500.00 fine, or both. MCL 28.729(3).

3. Additional Mandatory Penalties

In addition to any of the foregoing penalties, MCL 28.729(4)-(6) mandates the following sanctions, if applicable:

- The court shall revoke probation of an individual who willfully violates SORA while on probation.
- The court shall revoke the youthful trainee status of an individual who willfully violates SORA while assigned to youthful trainee status.
- The parole board shall rescind the parole of an individual who willfully violates SORA while released on parole.

L. Pertinent Case Law Challenging Registration Act**1. Retroactive Application**

Retroactive application of the SORA does not violate the Ex Post Facto Clauses of the Michigan or United States Constitution. See *People v Pennington*, 240 Mich App 188, 197 (2000), adopting the analyses in *Lanni v Engler*, 994 F Supp 849 (ED Mich, 1998), and *Doe v Kelley*, 961 F Supp 1105 (WD Mich, 1997), which both held that Michigan’s SORA registration provisions are not punitive.

2. Cruel and Unusual Punishment Under U.S. Constitution

The SORA’s registration and notification requirements are not “punishment” and therefore do not violate the U.S. Constitution’s Eighth Amendment prohibition against cruel and unusual punishment. *Lanni, supra* at 853-854.

3. Cruel or Unusual Punishment Under Michigan Constitution

The SORA’s registration requirements are not “punishment” and therefore do not constitute cruel or unusual punishment under Const 1963, art 1, § 16. *In re Ayres*, 239 Mich App 8 (1999).

Note: The Court of Appeals in *In re Ayres* ruled only on the SORA's registration requirements, not its notification requirements. However, it adopted, as did the Court in *Pennington, supra* at 197, the analyses in two U.S. District Court opinions, *Lanni, supra*, and *Kelley, supra*, which held that the SORA's registration *and* notification requirements do not constitute "punishment."

4. Double Jeopardy, Equal Protection, and Due Process Under U.S. Constitution

The SORA's registration and community notification provisions do not constitute criminal "punishment" and therefore do not violate the Double Jeopardy Clause of the U.S. Constitution. *Lanni, supra* at 854.

The SORA does not violate the Equal Protection Clause of the U.S. Constitution because defendant, as a sex offender, is not in a "suspect class," and the SORA is reasonably related to the government's legitimate interest of protecting the public. *Id.* at 855.

The SORA does not deprive a sex offender of a protected liberty or property interest and therefore does not violate the procedural provisions of the U.S. Constitution's Due Process Clause. *Id.*; *Kelly, supra* at 1112.*

The SORA's notification provisions do not deprive a sex offender of a right to privacy and therefore do not violate substantive due process, because "the information made public by the [SORA] is already a matter of public record, to which no privacy rights attach." See *Lanni, supra* at 856; and *Kelly, supra* at 1112.*

In *Fullmer v Michigan Dep't of State Police*, ___ F Supp ___ (ED Mich, 2002), the U.S. District Court for the Eastern District of Michigan held that Michigan's SORA violates the procedural due process protections established under US Const, Am XIV because its requirements satisfy the "stigma plus" test set forth in *Paul v Davis*, 424 US 693 (1976). The District Court in *Fullmer* held that the "stigma" was SORA's failure to differentiate between dangerous and non-dangerous registrants. In the court's view, this constituted government defamation of reputation. The "plus" factor was the alteration of a sex offender's legal status by SORA's ongoing registration requirements and its criminal penalties for noncompliance. Based on these findings, the District Court held that "Michigan's SORA must be invalidated because it provides no opportunity to be heard on whether, and to what extent, public notification of sex offenders' registry information is necessary to protect the public, and the extent to which the registration requirements should burden sex offenders, when balanced against the need to protect the public." *Id.* at ____.

*However, see the discussion of *Fullmer, infra*.

*However, see the discussion of *Fullmer, infra*.

*The action against the Michigan Department of State Police was barred and dismissed under US Const, Am XI, leaving the co-defendant Director as the remaining defendant.

As a result, the District Court enjoined the Director of the Michigan State Police* from further enforcement of the SORA. In response, the Michigan State Police deactivated its sex offenders Internet website as of 8:28 a.m., June 4, 2002, and effectively discontinued sex offender registration and verification, including public and law enforcement viewing of the registrations. However, in response to a motion for a stay filed on June 11, 2002 by the Michigan Attorney General, the District Court denied the stay but modified its initial order to allow and disallow the following activities:

1. Allow restoration of the sex offender registry and its use for law enforcement purposes.
2. Allow enforcement of violations of the SORA and require offenders to continue to register and verify their addresses in accordance with SORA.
3. Disallow public access to sex offender registry, including viewing of the law enforcement websites and any printed versions of the registry.

The District Court's July 25, 2002 order, which is available at [http://www.mied.uscourts.gov/_opinions/robertspdf/fullmer\(stay\).pdf](http://www.mied.uscourts.gov/_opinions/robertspdf/fullmer(stay).pdf) (last visited July, 25, 2002), states that every state, county and local law enforcement agency is bound by the order. As of this Benchbook's research cut-off date, the foregoing order is still effective. However, the Attorney General has filed an appeal with the Sixth Circuit Court of Appeals. The result of that appeal is pending. Nevertheless, the *Fullmer* order operates to prohibit public viewing of SORA registrations because it specifically enjoined the Director of the Michigan State Police (who is charged with maintaining SORA registrations, databases, and websites) from allowing public access to the sex offender registry.

Note: On May 20, 2002, the United States Supreme Court granted certiorari in *Connecticut Department of Public Safety v Doe*, 122 S Ct 1959 (2002), a case involving a substantially similar due process attack on Connecticut's sex offender registry.

5. Due Process Under Michigan Constitution

In a case of first impression, the Court of Appeals in *In re Wentworth*, ___ Mich App ___ (2002), held that SORA's requirements are not an unconstitutional infringement of defendant's protected liberty, property, or privacy interests, and that the state is not required to engage in due process beyond that afforded in defendant's juvenile court proceedings. The Court held that SORA did not deprive defendant of any privacy interest since the public dissemination of defendant's personal information is truthful and already a matter of public record. *Id.* at ___. The Court further held that SORA did not deprive defendant of any liberty interest, and that any deprivation suffered by defendant flowed not from SORA but from the defendant's own misconduct that resulted in the juvenile disposition. Further, the Court held that, "even if SORA deprived defendant of liberty, she was afforded due process, i.e., notice and opportunity to be heard, through the family court proceedings prior to entry of the order of disposition." *Id.* at ___. Finally, the

Court held that SORA did not violate the exclusive jurisdiction of the family division of circuit court since SORA's requirements do not confer jurisdiction to the Michigan State Police over juveniles but rather only implementation and enforcement responsibilities.

6. HYTA Defendants Must Comply With SORA's Requirements

A defendant convicted of a "listed offense" and sentenced pursuant to the Holmes Youthful Trainee Act (HYTA), MCL 762.11 et seq., must comply with the requirements of SORA before *and* after discharge from youthful trainee status. *People v Rahilly*, 247 Mich App 108, 115-117 (2001).

7. Juvenile Offenders and SORA's Requirements

Juvenile offenders not tried as adults are generally exempt from SORA's public notification provisions. *In re Ayres*, *supra* at 12. However, this exemption does not apply to juvenile dispositions for either CSC I or CSC II after the juvenile offender becomes 18 years of age. MCL 28.728(2). See Section 11.2(H), above, for further discussion of this issue.

A juvenile offender and his parents were not denied the equal protection of laws when the juvenile listed his parents' address as his address under the SORA, because the information regarding the juvenile is not available to the public and does not constitute punishment. *In re Whittaker*, 239 Mich App 26, 31 (1999).

8. Voir Dire Regarding Sex Offender Registration

During voir dire, potential jurors may not be informed that the defendant may have to register under the SORA if convicted or adjudicated of a "listed offense" under SORA. *In re Spears*, 250 Mich App 349, 355-356 (2002).*

*For more information on voir dire in sexual assault cases, see Section 6.14.

11.3 Combined DNA Index System (CODIS)

The Combined DNA Index System (CODIS), established under the DNA Identification Act of 1994, 42 USC 14132 et seq., and operated by the Federal Bureau of Investigation (FBI), is a software and distributive database system that indexes actual DNA profiles gathered from crime scene evidence and from selected state and federal criminal offenders nationwide.* The primary purpose of CODIS is to facilitate the investigation and apprehension of criminal offenders by linking together state databases and allowing law enforcement personnel to access DNA profile information nationwide. CODIS is comprised of three tiers or levels:

- F National DNA Index System (NDIS):** A national repository for DNA profiles collected from the states and federal government. NDIS permits states to exchange DNA profiles and to perform interstate searches. NDIS is operated by the FBI.

*See Section 11.4 for a discussion of Michigan's DNA Identification and Profiling System Act, which authorizes the collection and retention of DNA samples from selected criminal and juvenile offenders.

*See Section 11.4 for more information on Michigan's DNA Identification and Profiling system.

*See Section 8.6(D)-(F) for further discussion of the PCR method and STRs.

*See Congressional Statement for the Record of Dr. Dwight E. Adams on Forensic DNA Analysis (March 23, 2000), available at <http://www.fbi.gov/congress/congress00/dadams.htm> (last visited July 25, 2002).

- F State DNA Index System (SDIS):** A state repository for DNA profiles collected from that particular state. SDIS allows the state's crime laboratories to exchange DNA profiles. SDIS serves as the communications link between the local DNA index systems and the NDIS. Michigan's SDIS is located at the Michigan State Police Forensic Laboratory in Lansing and is governed, in part, by the requirements in the DNA Identification and Profiling System Act, MCL 28.171 et seq.* The DNA profiles in SDIS are periodically uploaded to NDIS.
- F Local DNA Index System (LDIS):** A local repository for DNA profiles, located at crime laboratories, which can be accessed by the state's law enforcement agencies. DNA profiles originate at this level and flow to state and national levels. Michigan's LDIS is located at three Michigan State Police Forensic Laboratories: Lansing, Northville, and Grand Rapids. The DNA profiles in LDIS are periodically uploaded to SDIS. Although DNA profiles are gathered from the seven MSP forensic laboratories, only three laboratories input and upload data to SDIS.

In the United States, 13 core short tandem repeat (STR) loci were chosen to serve as the basis for the CODIS national database. These 13 core loci, which are analyzed using well-established polymerase chain reaction (PCR) methods,* are as follows: CSF1PO, FGA, TH01, TPOX, VWA, D3S1358, D5S818, D7S820, D8S1179, D13S317, D16S539, D18S51, and D21S11. Butler, *Forensic DNA Typing* (Academic Press, 2001), p 62.

Note: For a discussion of DNA nomenclature, see *Id.* at 18 (e.g., the STR marker TH01 means that it is from the “tyrosine hydroxylase” gene, located on chromosome 11; the STR marker D16S539 means the following: “D” for DNA, “16” for chromosome 16, “S” for single copy sequence, “539” for 539th locus described on chromosome 16).

All 50 states now have legislation authorizing the collection of DNA samples from categories of convicted offenders for inclusion into a DNA database.* Moreover, federal legislation now authorizes the collection of DNA samples and indexing of DNA analyses from individuals convicted of a “qualifying federal offense” (42 USC 14135a), a “qualifying military offense” (10 USC 1565), and a “qualifying District of Columbia” offense (42 USC 14135b).

More information on CODIS is available on the FBI's website, located at <http://www.fbi.gov/hq/lab/codis/brochures.htm> (last visited July 25, 2002).

For a copy of the Michigan State Police's *Convicted Felon Database Buccal Collection Kit*, and a training CD associated with the Kit, contact the Michigan State Police CODIS Laboratory, located at 7320 North Canal Road, Lansing, Michigan 48913, telephone 517-322-6264.

A. Contents of CODIS

42 USC 14132(a)(1)-(4) authorizes the indexing of the following records and analyses:

- F DNA identification records of persons convicted of crimes.
- F Analyses of DNA samples recovered from crime scenes.
- F Analyses of DNA samples recovered from unidentified human remains.
- F Analyses of DNA samples voluntarily contributed from relatives of missing persons.

B. Access and Disclosure Requirements

42 USC 14132(b)(3)(A)-(D) allows disclosure of stored DNA samples and DNA analyses only to the following agencies, or for the following purposes:*

- F To criminal justice agencies for law enforcement identification purposes.
- F In judicial proceedings, if otherwise admissible pursuant to applicable statutes or rules.
- F For criminal defense purposes, to a defendant, who shall have access to samples and analyses performed in connection with the case in which such defendant is charged.
- F If personally identifiable information is removed, for a population statistics database, for identification research and protocol development purposes, or for quality control purposes.

*For Michigan's disclosure limitations, see Section 11.4(D).

C. Expungement of DNA Analyses

42 USC 14132(d)(1)(A) requires the FBI to “promptly expunge” the DNA analysis of a person included in the index on the basis of a qualifying federal offense, a qualifying District of Columbia offense, or a qualifying military offense if it receives, for each conviction of the qualifying offense, a certified copy of a final court order establishing that the conviction has been overturned. A court order is not “final” if time remains for an appeal or application for discretionary review with respect to the order. 42 USC 14132(d)(1)(C).*

*For Michigan's specific disposal requirements, see Section 11.4(G).

42 USC 14132(d)(2)(A) requires as a condition of access to the index that a state “promptly expunge” the DNA analysis of a person included in the index by that state if the responsible agency or official of that state receives, for each conviction of a qualifying offense, a certified copy of a final order establishing that such conviction has been overturned. A court order is not “final” if the time remains for an appeal or application for discretionary review with respect to the order. 42 USC 14132(d)(2)(B).

11.4 DNA Identification Profiling System

*See Section 11.3 for more information on CODIS.

*Including a juvenile convicted through “waiver” or “designation.”

Michigan’s “DNA Identification Profiling System Act,” MCL 28.171 et seq., which took effect on June 17, 1994, is part of the national Combined DNA Index System (CODIS)* that links together existing state DNA databases. Michigan’s Act requires the *collection* of blood, saliva, or tissue samples from selected criminal and juvenile offenders, along with the *retention* of the resultant “DNA identification profiles.” The Act works in conjunction with five other statutes, each requiring a certain class of criminal and juvenile offenders to provide DNA samples for a type of offense. The classes of offenders are as follows:

- F A person* convicted of any felony, attempted felony, or specified misdemeanor on or after January 1, 2002, MCL 750.520m (penal code).
- F A juvenile found responsible for a specified offense on or after January 1, 2002, MCL 712A.18k(1) (juveniles).
- F A person in custody
 - A person in prison on or after January 1, 2002, MCL 791.233d (prisoners under jurisdiction of DOC).
 - A juvenile committed to the Family Independence Agency based on being convicted of or found responsible for a specified offense on or after January 1, 2002, MCL 803.225a(1) (juveniles committed to FIA).
 - A juvenile who is a public ward based on being convicted of or found responsible for a specified offense on or after January 1, 2002, MCL 803.307a(1) (public wards).

The remaining subsections discuss Michigan’s DNA Identification Profiling System Act, including the interplay with the foregoing statutes. Each subsection is generally broken down by class of offenders as listed above.

The requirements for the collection and retention of DNA samples and identification profiles are in addition to the testing/counseling requirements for communicable diseases, such as venereal disease, hepatitis, HIV, and AIDS. For more information on those requirements, see Sections 6.13 and 9.3.

For a copy of the Michigan State Police’s *Convicted Felon Database Buccal Collection Kit*, and a training CD associated with the kit, contact the Michigan State Police CODIS Laboratory, located at 7320 North Canal Road, Lansing, Michigan 48913, telephone 517-322-6264.

A. Persons Required to Provide Blood, Saliva, or Tissue Samples

All offenders meeting the requirements detailed below must provide a DNA sample, unless at the time the person is required to provide the sample the investigating law enforcement agency or State Police already has a sample

from the person that meets the requirements of the DNA Identification Profiling System Act under MCL 28.171 to 28.176. See MCL 28.176(3) (DNA Identification Profiling System Act); MCL 750.520m(2) (penal code); MCL 712A.18k(2) (juveniles); MCL 803.225a(2) (juveniles committed to FIA); MCL 803.307a(2) (public wards); and MCL 791.233d(1) (prisoners under jurisdiction of DOC).

1. Persons Convicted On or After January 1, 2002

A person, including a juvenile “waived” into the criminal division of circuit court or “designated” to be tried as an adult in family division of circuit court, who is convicted on or after January 1, 2002 of any one of the following offenses is required under MCL 750.520m(1)(b) to provide a blood, saliva, or tissue sample for DNA testing.*

- F A felony or attempted felony.*
- F Any of the following misdemeanors or local ordinances substantially corresponding to the following misdemeanors:
 - Accosting, enticing, or soliciting a child, MCL 750.145a.
 - Disorderly person (window peeping), MCL 750.167(1)(c).
 - Disorderly person (indecent or obscene conduct), MCL 750.167(1)(f).
 - Disorderly person (loitering in house of prostitution), MCL 750.167(1)(i).
 - Indecent exposure, MCL 750.335a.
 - Prostitution (first and second violations), MCL 750.451.
 - Leasing a house for prostitution, MCL 750.454.
 - Female under 17 in house of prostitution, MCL 750.462.

2. Juveniles Found Responsible On or After January 1, 2002

A juvenile found responsible on or after January 1, 2002 for any one of the following offenses is required under MCL 750.520m(1)(a) to provide a blood, saliva, or tissue sample for DNA testing:*

- F Assault with intent to commit murder, MCL 750.83.
- F Attempted murder, MCL 750.91.
- F First-degree murder, MCL 750.316.
- F Second-degree murder, MCL 750.317.
- F Manslaughter, MCL 750.321.

*SCAO Form MC 283, available at <http://www.courts.michigan.gov/scao/courtforms/generalcriminal/mc283.pdf> (last visited July 25, 2002).

*A “felony” means “a violation of a penal law of this state for which the offender may be punished by imprisonment for more than 1 year or an offense expressly designated by law to be a felony.” See MCL 750.520m(11)(c).

*See SCAO Form MC 283, available at <http://www.courts.michigan.gov/scao/courtforms/generalcriminal/mc283.pdf> (last visited July 25, 2002).

- F Kidnapping, MCL 750.349.
- F First-degree criminal sexual conduct, MCL 750.520b.
- F Second-degree criminal sexual conduct, MCL 750.520c.
- F Third-degree criminal sexual conduct, MCL 750.520d.
- F Fourth-degree criminal sexual conduct, MCL 750.520e.
- F Assault with intent to commit criminal sexual conduct, MCL 750.520g.
- F An attempted violation of kidnapping or any of the foregoing criminal sexual conduct offenses.
- F Disorderly person (window peeper), MCL 750.167(1)(c), and (indecent or obscene conduct), MCL 750.167(1)(f).
- F Indecent exposure, MCL 750.335a.
- F A local ordinance substantially corresponding to the foregoing disorderly person and indecent exposure statutes.

3. Persons in Custody On or After January 1, 2002

A person in prison under the custody of the Department of Corrections on or after January 1, 2002 must not be released on parole, placed in a community placement facility, including a community corrections center or a community residential home, or discharged upon completion of his or her maximum sentence, until he or she has provided a blood, saliva, or tissue sample for DNA testing. MCL 791.233d(1). However, a prisoner is not required to provide a sample or pay an assessment fee if, at the time the prisoner is to be released, placed, or discharged, the State Police already has a sample from the prisoner that meets the requirements of the DNA Identification Profiling System Act under MCL 28.171 to 28.176. MCL 791.233d(1).*

A juvenile who is under the supervision of the Family Independence Agency or a county juvenile agency because of being convicted of an offense in Section 11.4(A)(1), or found responsible for an offense in Section 11.4(A)(2), must not be placed in a community placement of any kind until he or she has provided a sample for chemical testing. MCL 803.225a(1). However, a juvenile under FIA supervision is not required to provide a sample or pay an assessment fee if, at the time the juvenile is convicted or found responsible, the state police already has a sample from the prisoner that meets the requirements of the DNA identification profiling system act under MCL 28.171 to 28.176. MCL 803.225a(2).

A public ward* who on or after January 1, 2002 is under a youth agency's jurisdiction because of being convicted of an offense in Section 11.4(A)(1), or (2) found responsible for an offense in Section 11.4(A)(2), must not be placed in a community placement of any kind or be discharged from wardship until he or she has provided a sample for chemical testing. MCL 803.307a(1).

*Unlike the testing requirements for juveniles and public wards detailed below, the testing requirements for prisoners is not predicated upon the type of convicted offense.

*See MCL 803.302(c) for a definition of "public ward."

However, a public ward is not required to provide a sample or pay an assessment fee if, at the time the public ward is convicted or found responsible, the State Police already has a sample from the prisoner that meets the requirements of the DNA Identification Profiling System Act under MCL 28.171 to 28.176. MCL 803.307a(2).

B. Responsible Agency and Timeframe of Sample Collection

The following subsections specify the agencies responsible for the collection of a person's blood, saliva, or tissue sample for DNA testing, as well as the applicable timeframes for the collection of samples.

1. Persons Convicted On or After January 1, 2002

For a person convicted on or after January 1, 2002 of an offense listed in Section 11.4(A)(1), including a juvenile convicted through waiver, the court must order the county sheriff or investigating law enforcement agency to collect the blood, saliva, and tissue sample.* MCL 750.520m(3). The sample must be collected after conviction but before sentencing, and promptly forwarded, along with any samples already in the agency's possession, to the State Police. MCL 28.176(4). The sample must be collected in a medically approved manner by qualified persons using supplies provided by the State Police. *Id.*

Note: Included within the above provisions are persons who are convicted of an offense for which a DNA sample is required, even though they happen to be in prison or supervised/committed to FIA/DCJ for another offense. Implementation of SCAO Administrative Memorandum 2001-10 Public Acts 84-91 - DNA Sampling and Assessment (July 16, 2002).

For a juvenile convicted in a designated proceeding on or after January 1, 2002 of an offense listed in Section 11.4(A)(1), the court must order only the investigating law enforcement agency to collect the blood, saliva, and tissue sample.* MCL 712A.18k(3). The sample must be collected after conviction but before sentencing, and promptly forwarded, along with any samples already in the agency's possession, to the State Police. MCL 28.176(4). The sample must be collected in a medically approved manner by qualified persons using supplies provided by the State Police. *Id.*

2. Juveniles Found Responsible On or After January 1, 2002

For a juvenile found responsible on or after January 1, 2002 for an offense listed in Section 11.4(A)(2), the court must order only the investigating law enforcement agency to collect a blood, saliva, and tissue sample.* MCL 712A.18k(3). The sample must be collected after a finding of responsibility but before disposition and promptly forwarded, along with any samples already in the agency's possession, to the State Police. MCL 28.176(4). The sample must be collected in a medically approved manner by qualified persons using supplies provided by the State Police. *Id.*

*SCAO Form MC 283, available at <http://www.courts.michigan.gov/scao/courtforms/generalcriminal/mc283.pdf> (last visited July 25, 2002).

*SCAO Form MC 283, available at <http://www.courts.michigan.gov/scao/courtforms/generalcriminal/mc283.pdf> (last visited July 25, 2002).

*SCAO Form MC 283, available at <http://www.courts.michigan.gov/scao/courtforms/generalcriminal/mc283.pdf> (last visited July 25, 2002).

Note: Included within the above provisions are juveniles who are found responsible for an offense for which a DNA sample is required, even though they happen to be supervised/committed to FIA/DCJ for another offense. Implementation of SCAO Administrative Memorandum 2001-10 Public Acts 84-91 - DNA Sampling and Assessment (July 16, 2002).

3. Persons in Custody On or After January 1, 2002

For a person in prison under the jurisdiction of the Department of Corrections (DOC) on or after January 1, 2002, the DOC is responsible for collecting a blood, saliva, or tissue sample before releasing the prisoner on parole, placing the prisoner in a community placement facility of any kind, including a community corrections center or a community residential home, or discharging the prisoner upon completion of his or her maximum sentence. MCL 791.223d(1). No court order is needed. Implementation of SCAO Administrative Memorandum 2001-10 Public Acts 84-91 - DNA Sampling and Assessment (January 16, 2002). The sample must be promptly forwarded, along with any samples already in the agency's possession, to the State Police. MCL 28.176(4). The sample must be collected in a medically approved manner by qualified persons using supplies provided by the State Police. *Id.* No court order or hearing is required to collect a sample, and the sample may be collected regardless of the person's consent. MCL 791.233d(3).

For a juvenile who on or after January 1, 2002 is under the supervision of the Family Independence Agency or a county juvenile agency because of being convicted of any offense listed in Section 11.4(A)(1), or found responsible for any offense listed in Section 11.4(A)(2), the FIA or county juvenile agency, whichever applies, is responsible for collecting a blood, saliva, or tissue sample before the juvenile is placed in a community placement of any kind or before discharge from wardship. MCL 803.225a(1). No court order is needed. Implementation of SCAO Administrative Memorandum 2001-10 Public Acts 84-91 - DNA Sampling and Assessment (January 16, 2002). The sample must be promptly forwarded, along with any samples already in the agency's possession, to the state police. MCL 28.176(4). The sample must be collected in a medically approved manner by qualified persons using supplies provided by the state police. *Id.* No court order or hearing is required to collect a sample, and the sample may be collected regardless of the juvenile's consent. MCL 803.225a(4).

*See MCL 803.302(c) for a definition of "public ward."

For a public ward* who on or after January 1, 2002 is under a youth agency's jurisdiction because of being convicted of any offense listed in Section 11.4(A)(1), or found responsible for any offense listed in Section 11.4(A)(2), the youth agency is responsible for collecting a blood, saliva, or tissue sample before the public ward is placed in a community placement of any kind or before discharge from wardship. MCL 803.307a(1). No court order is needed. Implementation of SCAO Administrative Memorandum 2001-10 Public Acts 84-91 - DNA Sampling and Assessment (January 16, 2002). The sample must be promptly forwarded, along with any samples already in the agency's possession, to the State Police. MCL 28.176(4). The sample must be collected in a medically approved manner by qualified persons using supplies provided

by the State Police. *Id.* No court order or hearing is required to collect a sample, and the sample may be collected regardless of the public ward's consent. MCL 803.307a(4).

C. Retention of DNA Identification Profiles

1. Permanent Retention

If a person meets the requirements in Section 11.4(A), above, the State Police must permanently retain a DNA identification profile* obtained from a sample in the manner prescribed under the DNA Identification Profiling System Act, MCL 28.171 to 28.176. MCL 28.176(1).

*See Section 11.4(H) for a definition of "DNA identification profile."

2. Temporary Retention

All other DNA identification profiles need only be retained as long as they are needed for a criminal investigation or prosecution. MCL 28.176(11). This temporary retention includes samples determined by the State Police Forensic Laboratory to have been submitted by a person eliminated as a suspect in a crime. MCL 28.176(12).

D. Disclosure Limitations

The DNA identification profile* of a DNA sample shall only be disclosed as follows:

- F To a criminal justice agency for law enforcement identification purposes.
- F In a judicial proceeding as authorized or required by a court.
- F To a defendant in a criminal case if the DNA profile is used in conjunction with a charge against the defendant.
- F For an academic, research, statistical analysis, or protocol developmental purpose.

*See Section 11.4(H) for a definition of "DNA identification profile."

See MCL 28.176(2)(a)-(d) (DNA Identification Profiling System); MCL 750.520m(5)(a)-(d) (penal code); MCL 712A.18k(10)(a)-(d) (juveniles); MCL 803.225a(5)(a)-(d) (juveniles committed to FIA); MCL 803.307a(5)(a)-(d) (public wards); and MCL 791.233d(5)(a)-(d) (prisoners under jurisdiction of DOC).

E. Ordering and Distribution of Assessment Fees

1. Persons Convicted or Found Responsible

A person who is required to provide a DNA sample under Section 11.4(A) must pay a \$60.00 DNA assessment fee. See MCL 28.176(5) (DNA Identification Profiling System Act); MCL 750.520m(6) (penal code); and

*A court order is required under these statutes.

MCL 712A.18k(4) (juveniles).^{*} However, a person is not required to provide a sample or pay the fee if a sample already exists and meets the requirements of the DNA Identification Profiling System Act. See MCL 28.176(3) (DNA Identification Profiling System Act); MCL 750.520m(2) (penal code); and MCL 712A.18k(2) (juveniles).

The assessment fee is in addition to any fines, costs, or other assessments imposed by the court. See MCL 28.176(5) (DNA Identification Profiling System Act); MCL 750.520m(6) (penal code); and MCL 712A.18k(4) (juveniles).

The assessment fee must be ordered on the record and listed separately in the adjudication order, judgment of sentence, or order of probation. See MCL 28.176(6) (DNA Identification Profiling System Act); MCL 750.520m(7) (penal code); and MCL 712A.18k(5) (juveniles).

The court may, after reviewing a verified petition, suspend payment of all or part of the assessment fee if it determines the person is unable to pay the assessment. See MCL 28.176(7) (DNA Identification Profiling System Act); MCL 750.520m(8) (penal code); and MCL 712A.18k(6) (juveniles).

The court must distribute all DNA assessments or portions of DNA assessments as follows:

- F 10% to the court.
- F 25% to the county sheriff or other investigating law enforcement agency that collected the DNA sample as designated by the court, which must be transmitted by the clerk of the court on the last day of every month.
- F 65% to the Department of Treasury for the State Police Forensic Science Division, which must be transmitted by the clerk of the court on the last day of every month.

See MCL 28.176(8) (DNA Identification Profiling System Act); MCL 750.520m(9) (penal code); and MCL 712A.18k(7) (juveniles).

2. Persons In Custody

A prisoner, juvenile, or public ward^{*} who is required to provide a DNA sample under Section 11.4(A) must pay a \$60.00 assessment fee. See MCL 791.233d(4) (prisoners under jurisdiction of DOC); MCL 803.225a(6) (juveniles committed to FIA); and MCL 803.307a(6) (public wards). No court order is required. However, the prisoner, juvenile, or public ward is not required to provide a sample or pay the fee if a sample already exists and meets the requirements of the DNA Identification Profiling System Act. See MCL 791.233d(1) (prisoners under jurisdiction of DOC); MCL 803.225a(2) (juveniles committed to FIA); and MCL 803.307a(2) (public wards).

^{*}See MCL 803.302(c) for a definition of "public ward."

The responsible department or agency must transmit the assessments or portions of assessments to the Department of Treasury for the State Police Forensic Science Division to defray the costs associated with the requirements of DNA profiling and retention. See MCL 791.233d(4) (prisoners under jurisdiction of DOC); MCL 803.225a(6) (juveniles committed to FIA); and MCL 803.307a(6) (public wards).

F. Criminal Penalties for Resisting or Refusing to Provide Samples

A person who resists or refuses to provide a sample for DNA identification profiling that is required by law is guilty of a misdemeanor punishable by imprisonment for not more than one year or a maximum \$1,000.00 fine, or both. MCL 28.173a(1). To be convicted of or found responsible for this offense, the person must be advised that resistance or refusal to provide a sample is a misdemeanor. *Id.* A person is not required to provide a sample if, at the time the person is required to provide the sample, the investigating law enforcement agency or State Police already has a sample from the person that meets the requirements of the rules promulgated under the DNA Identification Profiling System Act. MCL 28.173a(2).

G. Disposal of Samples and DNA Identification Profile Records

1. Person Eliminated As Suspect

If the State Police Forensic Laboratory has determined that a sample has been submitted by a person who has been eliminated as a suspect in a crime, it must dispose of the sample in accordance with MCL 333.13811 (disposal of medical waste). MCL 28.176(12)(a). Additionally, the disposal of the sample or DNA identification profile record must be done in the presence of a witness. MCL 28.176(12)(a). After disposal of the sample or DNA identification profile record, the laboratory must make and keep a record of the disposal, signed by the person who witnessed the disposal. MCL 28.176(13).

2. Reversal of Conviction By Appellate Court

If a person has one conviction (and not more than one) reversed by an appellate court, he or she may petition the sentencing court to order the disposal of the sample and DNA identification profile record for that conviction. MCL 28.176(10). The person has the burden of proof by “clear and convincing evidence that the conviction was reversed based upon the great weight of the evidence,” which means specifically that “there was overwhelming evidence against the verdict resulting in a miscarriage of justice.” *Id.*

H. Definition of Terms

“DNA identification profile” means “the results of the DNA identification profiling of a sample.” See MCL 28.172(b) (DNA Identification Profiling System Act); MCL 750.520m(11)(a) (penal code); and MCL 712A.18k(11)(a) (juveniles).

“DNA identification profiling” means “a validated scientific method of analyzing components of deoxyribonucleic acid molecules in a biological specimen to determine a match or a nonmatch between a reference sample and an evidentiary sample.” See MCL 28.172(c) (DNA Identification Profiling System Act); MCL 750.520m(11)(a) (penal code); and MCL 712A.18k(11)(a) (juveniles).

“Investigating law enforcement agency” means “the law enforcement agency responsible for the investigation of the offense for which the individual is convicted. Investigating law enforcement agency includes the county sheriff but does not include a probation officer employed by the department of corrections.” See MCL 28.172(e) (DNA Identification Profiling System Act); MCL 750.520m(11)(b) (penal code); and MCL 712A.18k(11)(c) (juveniles). In light of the foregoing definition, “DOC probation officers should not be ordered to take DNA samples, nor should the prison facility be ordered to take DNA samples, as they are not the investigating law enforcement agency. Only local sheriff departments or police agencies should be ordered to do the testing.” SCAO Administrative Memorandum 2002-03 Orders for DNA Sample (April 26, 2002).

“Sample” means “a portion of an individual’s blood, saliva, or tissue collected from the individual.” See MCL 28.172(f) (DNA Identification Profiling System Act); MCL 750.520m(11)(d) (penal code); MCL 712A.18k(11)(d) (juveniles); MCL 803.307a(7)(b) (public wards); MCL 803.225a(7)(a) (juveniles committed to FIA); and MCL 791.233d(6) (prisoners).

11.5 “Sexually Motivated Crimes” Confidential Filing System

Michigan’s “Sexually Motivated Crimes” confidential filing system, MCL 28.247, which took effect on June 7, 1955, catalogs information regarding persons accused of “sexually motivated crime[s].”^{*} It requires the sheriff of every county and chief executive officer of every city, village, and township police department to make a report (using MSP Form DD-79) of an accused person “against whom a warrant has been issued” for a sexually motivated crime. This report must be forwarded to the State Police. See MCL 28.247; and *People v Cooper (After Remand)*, 220 Mich App 368, 374 n 2 (1996).

^{*}The phrase “sexually motivated crime” is not defined by statute or case law.

Upon receipt of Form DD-79, the State Police must file the information contained in the form “in a separate confidential filing system.” The information in this confidential filing system may only be accessed for official use by selected law enforcement agencies and courts of record. See MCL 28.247; and Section 11.5(A). Although the information in this confidential filing system is often used by law enforcement personnel, trial courts may find the information useful in making bond, pretrial release, and sentencing* decisions of criminal sex offenders.

Note: Although MCL 28.247 *requires* local law enforcement agencies to forward sexually motivated crime reports to the State Police on persons “against whom a warrant has been issued,” it does not prevent such agencies from submitting reports before a warrant has been issued (if it is ever issued), or even before an arrest has been made.

A copy of MSP Form DD-79 appears in Appendix E.

A. Who May Examine the Confidential Reports?

Under MCL 28.247, all “sexually motivated crime” reports are confidential and shall only be examined by the following persons or entities for official use only:

- F Attorney General.
- F Any prosecuting attorney.
- F Any court of record.
- F Director of the State Police.
- F County sheriffs.
- F The chief executive officer of any city, village, or township police department, and their authorized officers.

Authorized persons may access a “sexually motivated crime” report by contacting the Department of Michigan State Police, Field Detective Division, Violent Crimes Unit, 2911 Eyde Parkway, Suite 130, East Lansing, Michigan 48823, at 517/336-6663 (General) or 517/333-5399 (Fax).

Note: MCL 28.247 does not authorize an accused person or an alleged victim to examine the “sexually motivated crime” report. In addition, according to the Court of Appeals in *People v Cooper (After Remand)*, 220 Mich App 368, 374 n 2 (1996), citing OAG 1956, No. 2,833, p 795 (December 29, 1956), an accused person is not, even upon release or acquittal, entitled to examine the sexually motivated crime report. However, an accused person or an alleged victim may seek a copy of the underlying police report, if one was created, from the applicable law enforcement agency under Michigan’s Freedom of Information Act, MCL 15.231 et seq. Although not always the case, a DD-79 form may accompany the underlying police report.

*A sentencing court is allowed to consider uncharged offenses, pending charges, and acquittals before imposition of sentence. *People v Coulter (After Remand)*, 205 Mich App 453, 456 (1994).

B. Criminal Penalties for Unauthorized Disclosure and Neglect or Refusal to Report or Perform Required Acts

A violation of any of the confidential provisions of MCL 28.247 is a misdemeanor punishable by imprisonment for not more than one year or a maximum \$500.00 fine, or both. MCL 28.247.

Additionally, the neglect or refusal of any officer or official to report as required, or to perform any act required to be performed under MCL 28.247, is a misdemeanor punishable by imprisonment for not more than 60 days or by a fine of not less than \$25.00 nor more than \$100.00, or both; such neglect or refusal shall also constitute malfeasance in office and subject the officer to removal from office. MCL 28.246.

11.6 Law Enforcement's Retention of Fingerprints, Arrest Card, and Description

*SCAO Form
MC 233.

MCL 28.243* "implements a system of identification and recording for law enforcement by authorizing law enforcement officials to take an accused person's fingerprints [and arrest card and description] and to forward those [items] to the Department of State Police." *People v Cooper (After Remand)*, 220 Mich App 368, 371 (1996). The following subsections discuss the statutory requirements for taking and destroying an accused's fingerprints, arrest card, and description.

A. Who Must Be Fingerprinted?

1. Felonies, State Misdemeanors (93 Days/\$1,000 Or More), and Criminal Contempt

Under MCL 28.243(1),* the arresting law enforcement agency must immediately take the fingerprints of a person arrested for any of the following:

- F A felony.
- F A state law misdemeanor for which the maximum penalty exceeds 92 days' imprisonment or a fine of \$1,000.00 or both.
- F Criminal contempt under MCL 600.2950 or MCL 600.2950a [governing personal protection orders (PPOs)].
- F Criminal contempt for violating a foreign protection order that satisfies the conditions of validity provided in MCL 600.2950i.

Note: A "foreign protection order" is "an injunction or other order issued by a court of another state, Indian tribe, or United States territory for the purpose of preventing a person's violent or threatening acts against, harassment of, contact with, communication with, or physical proximity to another person." MCL 600.2950h(a). A "foreign protection order" does not include support or child custody orders issued pursuant to state divorce and

*Amended by
2001 PA 203,
effective
October 1,
2002.

child custody laws, except to the extent that such orders are entitled to full faith and credit under other federal law. *Id.*

- F A juvenile offense other than one for which the maximum possible penalty does not exceed 92 days' imprisonment or a fine of \$1,000.00, or both.

Note: A "juvenile offense" is an offense that, if committed by an adult, would be a felony, a misdemeanor, or a criminal contempt conviction for a violation of a PPO or foreign protection order. MCL 28.241a(h).

The fingerprints must be sent to the State Police within 72 hours after arrest. MCL 28.243(1). In turn, the State Police must send a set of fingerprints to the Federal Bureau of Investigation. *Id.*

Note: On felonies and misdemeanors punishable by imprisonment for more than 92 days, the magistrate must examine the court file at the time of arraignment to determine if the person has had his or her fingerprints taken pursuant to MCL 28.243. MCL 764.29(1). If the person has not been fingerprinted, the magistrate must either order the person to submit himself or herself to the police agency that arrested the person (or that obtained the arrest warrant against that person) to effectuate the taking of the person's fingerprints, or order the person committed to the custody of the sheriff for the taking of the fingerprints. MCL 764.29(2)(a)-(b).

2. State Misdemeanors (93 Days Only), Local Ordinances Substantially Corresponding to State Misdemeanors (93 Days Only), and Criminal Contempt

Under MCL 28.243(2),* a law enforcement agency must take the fingerprints of a person arrested for any of the following:

- F A misdemeanor violation of state law for which the maximum penalty is 93 days.
- F Criminal contempt under MCL 600.2950 or MCL 600.2950a [governing personal protection orders (PPOs)].
- F Criminal contempt for a violation of a foreign protection order that satisfies the conditions for validity provided in MCL 600.2950i.
- F A violation of a local ordinance for which the maximum possible penalty is 93 days' imprisonment and that substantially corresponds to a violation of state law that is a misdemeanor for which the maximum term of imprisonment is 93 days.

If the person is convicted of any violation, the law enforcement agency must take the person's fingerprints before sentencing, if not previously taken. MCL 28.243(2). The court must forward a copy of the disposition of conviction to the law enforcement agency, which must forward the person's fingerprints and a copy of the disposition of conviction to the State Police within 72 hours after receiving the disposition of conviction. *Id.* If the person was convicted of violating a local ordinance, the law enforcement agency must indicate on

*Amended by
2001 PA 203,
effective
October 1,
2002.

the form the statutory citation for the state law to which the local ordinance substantially corresponds. *Id.*

Note: On felonies and misdemeanors punishable by imprisonment for more than 92 days, the magistrate must examine the court file at the time of arraignment to determine if the person has had his or her fingerprints taken pursuant to MCL 28.243. MCL 764.29(1). If the person has not been fingerprinted, the magistrate must either order the person to submit himself or herself to the police agency that arrested the person (or that obtained the arrest warrant against that person) to effectuate the taking of the person's fingerprints, or order the person committed to the custody of the sheriff for the taking of the fingerprints. MCL 764.29(2)(a)-(b).

3. State Misdemeanors and Local Ordinances (Up to 92 Days/ \$1,000)

*Amended by
2001 PA 203,
effective
October 1,
2002.

Under MCL 28.243(4),* the arresting law enforcement agency may take one set of fingerprints of a person arrested for a misdemeanor punishable by imprisonment for not more than 92 days or a fine of not more than \$1,000.00, or both, and who fails to produce satisfactory evidence of identification as required under MCL 780.581 (release of misdemeanor prisoners). The fingerprints must be immediately forwarded to the State Police. MCL 28.243(4). Upon completion of the identification process by the State Police, the fingerprints must be destroyed. *Id.*

4. All Other Misdemeanors

Under MCL 28.243(5), the arresting law enforcement agency in this state may take a person's fingerprints upon arrest for a misdemeanor other than a misdemeanor described above in MCL 28.243(1), (2), or (4), and may forward the fingerprints to the State Police.

5. Offenses Under The Sex Offenders Registration Act

*Amended by
2001 PA 204,
effective
October 1,
2002. See
Section
11.2(A)(2) for a
definition of
"listed
offense."

Under MCL 769.16a(6)*, the clerk of the court, as part of the sentence of conviction, must order the fingerprints of a person convicted of a "listed offense,"* to be taken and forwarded to the State Police, as provided under the Sex Offenders Registration Act (SORA), MCL 28.721 et seq., if the fingerprints have not already been taken and forwarded under that Act.

B. Mandatory Reporting By Clerk of Court on Final Dispositions

Under MCL 769.16a(1), the clerk of the court must immediately report to the State Police the final disposition of any of the following original charges:

- F A felony.
- F A misdemeanor for which the maximum possible penalty exceeds 92 days.

- F A local ordinance for which the maximum possible penalty is 93 days and that substantially corresponds to a state misdemeanor for which the maximum possible penalty is 93 days.
- F A misdemeanor in a case in which the appropriate court was notified that fingerprints were forwarded to the State Police.
- F A charge of criminal contempt under MCL 600.2950 or MCL 600.2950a [governing personal protection orders].
- F A charge of criminal contempt for violating a foreign protection order that satisfies the conditions for validity provided in MCL 600.2950i.

MCL 769.16a(1) requires the report to include the finding of the judge or jury (guilty, guilty but mentally ill, not guilty, or not guilty by reason of insanity, or the person's plea of guilty, nolo contendere, or guilty but mentally ill), the offense for which the person was convicted, if convicted, and a summary of the sentence imposed. *Id.* This summary must include any probationary term; any minimum, maximum, or alternative term of imprisonment; total fines, costs, and restitution ordered; any modification of sentence; and the sentence if imposed under any of the following deferred proceedings statutes: MCL 333.7411 (controlled substances); MCL 762.11 et seq (Holmes Youthful Trainee Act); and MCL 769.4a (domestic violence).*

*For reportable juvenile offenses and corresponding fingerprint requirements, see Miller, *Juvenile Justice Benchbook* (MJJ, 1998), Section 4.10.

C. Requirements to Destroy Fingerprints and Arrest Card

MCL 28.243(7)-(8)* require the destruction of fingerprints and arrest cards after a case has been concluded in one of the following ways:

- F **If a person is arrested for having committed a felony or misdemeanor and is released without being charged, or if a petition is not authorized against a juvenile accused of a juvenile offense:** The official taking or holding the person's or juvenile's fingerprints and arrest card shall *immediately* destroy the fingerprints and arrest card. MCL 28.243(7).
- F **If a person is accused and found not guilty of the offense, or if a juvenile is adjudicated and found not responsible:** The official holding the person's or juvenile's fingerprints and arrest card shall destroy the fingerprints and arrest card within 60 days of the finding of not guilty or adjudication. If the information is not destroyed within 60 days of the finding of not guilty or adjudication, the person or juvenile has the right to obtain an order from the court having jurisdiction over the case for the return of the information. If the court order is not complied with, the person has a right to petition the circuit court of the county where the original charge was made for a preemptory writ of mandamus. MCL 28.243(8).

*Amended by 2001 PA 203, effective October 1, 2002. See also SCAO Form MC 235.

*See the next subsection for types of offenses that preclude destruction or return of these items; see also the dismissal block on SCAO Form MC 235.

Note: The statutes governing the destruction of fingerprints are silent on whether fingerprints must be destroyed in cases involving dismissals, acquittals, or personal protection orders (PPOs). Moreover, no other statutory provision specifically mandates such destruction. However, MCL 28.243(8) does require the clerk of the court, upon final disposition of the charge, to notify the State Police of a *dismissal* of a criminal charge. Additionally, it is State Police practice to destroy (previously it was State Police practice to return) fingerprints whenever a criminal charge is (or was) dismissed.* In *People v Pigula*, 202 Mich App 87 (1993), the Court of Appeals declined to order the return of defendant's fingerprints, arrest card, and description because the dismissed CSC I and CSC II charges were in the category of offenses precluding return of such items. *Id.* at 90-91. However, the Court did not address the specific issue of whether MCL 28.243 permits such a return if the criminal charge was dismissed and was not in the category of offenses precluding return.

D. Circumstances and Offenses Justifying Refusal to Destroy Fingerprints and Arrest Card

Under MCL 28.243(12), the provisions requiring the destruction of a person's fingerprints and arrest card after acquittal (or a finding of not responsible) in MCL 28.243(8) do not apply to persons arraigned in circuit court (including the family division) for any of the following:

- F The commission or attempted commission of a crime with or against a child under 16 years old.
- F Rape.
- F Criminal sexual conduct "in any degree."*
- F Sodomy.
- F Gross indecency.
- F Indecent liberties.
- F Child abusive commercial activities.
- F A person who has a prior conviction other than a misdemeanor traffic offense, unless a judge of a court of record, except the probate court, by express order on the record, orders the destruction or return of the fingerprints and arrest card.
- F A person arrested who is a juvenile charged with an offense that would constitute the commission or attempted commission of any of the foregoing crimes if committed by an adult.

Denying the return of fingerprints, arrest card and description to an accused acquitted of a criminal sexual conduct offense does not violate the Equal Protection Clauses of the United States and Michigan Constitutions. *People v Cooper (After Remand)*, 220 Mich App 368, 375 (1996) (The separate classification of persons accused of criminal sexual conduct offenses is

*It is unclear whether this provision also includes assault with intent to commit sexual penetration, MCL 750.520g(1), or assault with intent to commit CSC II, MCL 750.520g(2).

rationally related to the legitimate state interest of facilitating the investigation and prosecution of such offenses. Also, “defendant’s right to be presumed innocent until proved guilty is not infringed where the state maintains the fingerprints and arrest cards in a criminal identification system. Fingerprints are a matter of identification, not incrimination.”)

MCL 28.243 does not violate a person’s right to privacy. *People v Pigula*, 202 Mich App 87, 91 (1993).

For more information on conviction records, and an offender’s right to set aside these records, see Section 9.8.

